

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THEODORE RICHARD BERKEY, ) Case No. SA CV 12-1762-PJW  
11 Plaintiff, )  
12 v. ) MEMORANDUM OPINION AND ORDER  
13 CAROLYN W. COLVIN, )  
14 ACTING COMMISSIONER OF THE )  
SOCIAL SECURITY ADMINISTRATION, )  
15 Defendant. )  
16 \_\_\_\_\_)

I. INTRODUCTION

Plaintiff appeals a decision by Defendant Social Security Administration ("the Agency"), denying his application for Disability Insurance benefits ("DIB"). He claims that the Administrative Law Judge ("ALJ") erred when she: (1) found that he did not have a severe liver impairment; (2) discounted the opinions of the treating and examining doctors; and (3) concluded that he was not credible. For the following reasons, the Court concludes that the ALJ erred and remands the case to the Agency for further proceedings consistent with this memorandum opinion and order.

1                           II. SUMMARY OF PROCEEDINGS

2         In April 2010, Plaintiff applied for DIB, claiming that he was  
3 disabled due to Hepatitis B and C, high blood pressure, dizziness,  
4 joint pain, mood swings, and depression. (Administrative Record  
5 ("AR") 24, 222-23, 254.) His application was denied initially and on  
6 reconsideration, after which he requested and was granted a hearing  
7 before an ALJ. (AR 142-46, 148-60.) Following the hearing in  
8 December 2011, the ALJ issued a decision, finding that Plaintiff was  
9 not disabled and denying benefits. (AR 24-33.) Plaintiff appealed to  
10 the Appeals Council, which denied review. (AR 1-5.) This action  
11 followed.

12                           III. DISCUSSION

13 A. The Step-Two Determination

14 Plaintiff claimed that he suffered from Hepatitis B and C, the  
15 manifestations of which precluded him from working. The ALJ found  
16 that that there was no objective evidence to support this claim and,  
17 concluded, therefore, that it was not a severe impairment. (AR 27.)  
18 Plaintiff contends that this was error. For the following reasons,  
19 the Court remands this issue to the Agency for further analysis.

20         Under 20 C.F.R. § 416.921, a "non-severe impairment" is one that  
21 does not significantly limit a person's physical or mental capacity to  
22 perform basic work-related functions. The determination that an  
23 impairment is "non-severe" is "'a de minimis screening device [used]  
24 to dispose of groundless claims.'" *Edlund v. Massanari*, 253 F.3d  
25 1152, 1158 (9th Cir. 2001) (quoting *Smolen v. Chater*, 80 F.3d 1273,  
26 1290 (9th Cir. 1996)). Such a finding is only appropriate when the  
27 "medical evidence establishes only a slight abnormality . . . which  
28 would have no more than a minimal effect on an individual's ability to

1 work . . . " Social Security Ruling 85-28; see also *Bowen v.*  
2 *Yuckert*, 482 U.S. 137, 154 (1987).

3 The evidence before the ALJ established that Plaintiff exhibited  
4 elevated levels of liver enzymes (AST and ALT) in four blood tests  
5 between December 2009 and February 2011. (AR 383, 522-24.) In  
6 addition, when Plaintiff's platelets were analyzed twice during this  
7 same period, his platelet counts were low. (AR 522-23.) The medical  
8 expert testified that, though this evidence could indicate that  
9 Plaintiff suffered from Hepatitis, he could not confirm this diagnosis  
10 without test results showing the presence of Hepatitis antigens or  
11 antibodies in the blood. (AR 124.)

12 Consistent with the medical expert's testimony, the ALJ  
13 determined that there was insufficient evidence to find that Plaintiff  
14 suffered from Hepatitis. (AR 27.) Less than three months later,  
15 Plaintiff had his blood tested and it proved positive for Hepatitis C  
16 antibodies. (AR 531.) This evidence was submitted to the Appeals  
17 Council, but the Appeals Council did not find that it supported a  
18 change to the ALJ's finding that Plaintiff's Hepatitis was not a  
19 severe impairment. (AR 1-7.)

20 The Appeals Council erred in reaching this conclusion. It  
21 appears to be undisputed that Plaintiff (who is now deceased) suffered  
22 from Hepatitis C. The medical expert testified that the elevated  
23 liver enzymes could be consistent with such a diagnosis but that that  
24 diagnosis could not be confirmed without a blood test showing that  
25 there were Hepatitis antibodies in the blood. (AR 124.) The April  
26 2012 blood test confirmed the existence of Hepatitis C antibodies,  
27 thus, also confirming the existence of Hepatitis. (AR 531.) The  
28

1 Appeals Council's decision that this new evidence did not require a  
2 change to the ALJ's finding was wrong.

3       The Agency disagrees. It argues that there was no evidence of  
4 Hepatitis B or C antibodies "during the relevant period," presumably  
5 the period ending with the ALJ's decision on January 30, 2012. (Joint  
6 Stip. at 10.) It appears that this argument is premised on the  
7 supposition that Plaintiff contracted Hepatitis between January 30,  
8 2012 and April 4, 2012. There is no evidence to support such a  
9 notion. In fact, the evidence supports the opposite conclusion. The  
10 objective evidence that is in the record--i.e., the elevated liver  
11 enzyme levels and the treatment notes from Plaintiff's doctors, which  
12 were based on their examinations--supports Plaintiff's view that the  
13 antibody evidence is nothing more than confirmation of what was  
14 already apparent from the record. Absent evidence that the April 2012  
15 test results should be confined to the post-January 30, 2012 period,  
16 they are relevant. See *Brewes v. Comm'r, Soc. Sec. Admin.*, 682 F.3d  
17 1157, 1162 (9th Cir. 2012) (explaining administrative record includes  
18 evidence submitted to and considered by the Appeals Council that  
19 relates to period before ALJ's decision); see also 20 C.F.R.  
20 § 404.970(b) ("If new and material evidence is submitted, the Appeals  
21 Council shall consider the additional evidence only where it relates  
22 to the period on or before the date of the administrative law judge  
23 hearing decision.").

24       The ALJ also relied on the fact that Plaintiff had not sought  
25 treatment for Hepatitis to conclude that Plaintiff's condition was not  
26 severe. (AR 27.) The record does not support this finding, either.  
27 In the first place, Plaintiff was being treated by a doctor who had  
28 recognized as early as 2007 that he was suffering from Hepatitis and

1 was treating him for this and his other afflictions. (AR 403.) In  
2 the second, Plaintiff's treating records reflect that he did not  
3 receive additional treatment for Hepatitis because he could not afford  
4 it. (AR 385, 464, 490.) As such, the ALJ should not have relied on  
5 the lack of treatment in analyzing this impairment. See *Gamble v.*  
6 *Chater*, 68 F.3d 319, 321 (9th Cir. 1995) ("[A] disabled claimant  
7 cannot be denied benefits for failing to obtain medical treatment that  
8 would ameliorate his condition if he cannot afford that treatment . .  
9 . .").

10 The Agency points to the fact that Plaintiff did not quit  
11 drinking when advised to by his treating doctor to do so and argues  
12 that this is evidence that his Hepatitis was not a severe impairment.  
13 (Joint Stip. at 13.) The Court will not rely on this explanation,  
14 however, because the ALJ did not rely on it. See *Bray v. Astrue*, 554  
15 F.3d 1219, 1225 (9th Cir. 2009) ("Long-standing principles of  
16 administrative law require us to review the ALJ's decision based on  
17 the reasoning and factual findings offered by the ALJ--not post hoc  
18 rationalizations that attempt to intuit what the adjudicator may have  
19 been thinking.").

20 Having concluded that the Agency erred, the Court must also  
21 address the issue of whether the error was harmless. The Court finds  
22 on this record that it was not. An error at step two is harmless when  
23 it is clear that the ALJ accounted for any resulting limitations  
24 caused by the allegedly non-severe impairment in a later step. *Lewis*  
25 *v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007); see also *Stout v.*  
26 *Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006) (noting  
27 that an error is harmless if it is "inconsequential to the ultimate  
28 non-disability determination."). Here, it is not clear whether the

1 ALJ did. Although the medical expert testified that he had considered  
 2 Listing 5.05 for chronic liver disease in his analysis (AR 122), he  
 3 apparently did not incorporate--or even consider--any limitations,  
 4 such as memory loss, malaise, and chronic fatigue, that Plaintiff's  
 5 treating and examining doctors identified as resulting from liver  
 6 disease. (AR 462, 466, 490.) Nor did the ALJ. (AR 29-32.) As such,  
 7 the error was not harmless and remand on this issue is warranted.<sup>1</sup>  
 8 See *Stout*, 454 F.3d at 1055.

9 **B. The Doctors' Opinions**

10 Plaintiff contends that the ALJ erred when she rejected the  
 11 opinions of his treating doctor Harris and examining doctor Ovalle,  
 12 who opined that Plaintiff was severely limited in his ability to  
 13 function. The ALJ rejected Dr. Harris' opinion--because it "sharply  
 14 contrast[ed]" with the medical evidence--and Dr. Ovalle's, in part,  
 15 because it was not consistent with the record as a whole. (AR 31-32.)  
 16 In light of the fact that the Court has concluded that the medical  
 17 evidence established that Plaintiff suffered from Hepatitis, which was  
 18 consistent with these doctors' findings, this issue, too, is remanded  
 19 for further consideration.

20 **C. The Credibility Determination**

21 Plaintiff argues that the ALJ erred in concluding that he was not  
 22 credible. For the following reasons, the Court finds that the ALJ  
 23 failed to give adequate reasons for rejecting Plaintiff's testimony.

24 ALJs are tasked with judging the credibility of witnesses. In  
 25 making credibility determinations, they may employ ordinary

---

27       <sup>1</sup> Plaintiff also underwent an ultrasound in April 2012, which  
 28 confirmed that he suffered from cirrhosis of the liver. (AR 534.) This, too, should be considered by the Agency on remand.

1 credibility evaluation techniques. *Smolen*, 80 F.3d at 1284. Where a  
2 claimant has produced objective medical evidence of an impairment  
3 which could reasonably be expected to produce the symptoms alleged and  
4 there is no evidence of malingering, the ALJ can only reject the  
5 claimant's testimony for specific, clear, and convincing reasons that  
6 are supported by substantial evidence in the record. *Id.* at 1283-84;  
7 *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

8 Plaintiff testified that he suffered from constant pain in his  
9 lower back, hips, and legs. (AR 131.) As a result, he could only sit  
10 for twenty minutes at a time and then had to get up and move around  
11 for at least twenty minutes. He also reported that he had to lie down  
12 for at least two hours out of an eight-hour day and took two to three  
13 naps a day because pain prevented him from sleeping well at night.  
14 (AR 129-30.) Plaintiff claimed that he also had memory problems. (AR  
15 132.) In a statement filled out by his wife and submitted on his  
16 behalf, she reported that he could not sit or stand "for long" and  
17 could only walk approximately one hundred yards before needing to stop  
18 and rest for ten minutes. (AR 277.)

19 The ALJ discounted these claims because: (1) Plaintiff's daily  
20 activities were inconsistent with his alleged limitations; and  
21 (2) although Plaintiff reported a history of depression and anxiety,  
22 he "denied ever seeing a psychiatrist, being hospitalized for  
23 psychiatric treatment, [] receiving any psychiatric treatment[,]  
24 including psychotherapy," and declined counseling when his treating  
25 doctor strongly advised it. (AR 31.)

26 The ALJ's first reason is not clear and convincing. Plaintiff  
27 reported that he prepared soup and sandwiches three times a week and  
28 gave food and water to his pets. (AR 273-74.) He also claimed that

1 he was able to take out the trash, sweep the porch for five minutes at  
2 a time, dust for ten minutes at a time, and do one load of laundry a  
3 week. (AR 274.) He reported that he went outside every day but could  
4 no longer garden, mow the lawn, or work on cars and motorcycles and  
5 that he could drive and shop for groceries for 30 minutes at a time.  
6 (AR 134, 275.)

7 These activities are not inconsistent with Plaintiff's claims  
8 that he was unable to sustain full-time work. As such, they do not  
9 constitute a sufficient basis for questioning his testimony that he  
10 was unable to work. See, e.g., *Vertigan v. Halter*, 260 F.3d 1044,  
11 1049-50 (9th Cir. 2001) (overruling ALJ's finding that claimant's  
12 testimony that she could not work was undermined by her reported daily  
13 activities where extent of daily activities did not suggest she  
14 performed them a substantial part of the day or that they would  
15 transfer to work setting).

16 As to the ALJ's second reason for questioning Plaintiff's  
17 testimony--that he did not seek psychiatric treatment despite his  
18 allegations of disabling anxiety and depression--this is not supported  
19 by the record, either. Plaintiff's treating doctor, Dr. Harris,  
20 treated him with medication for anxiety (among other things) for  
21 almost two years (from April 2009 to March 2011), which, apparently,  
22 controlled his symptoms. (AR 384-389, 392-95, 436, 443-44.)  
23 Beginning in March 2011, and continuing to November 2011, Dr. Harris  
24 noted increased anxiety and depression, panic attacks, and poor  
25 improvement with medication and encouraged Plaintiff to seek  
26 counseling. (AR 443-44, 490-91, 498-99.) In November 2011, Plaintiff  
27 rejected Dr. Harris' advice to seek counseling. (AR 499.)

28

1       Thus, though there was a brief period before the January 2012  
 2 decision in which Plaintiff elected not to treat his anxiety as  
 3 recommended, it appears from the record that, throughout the majority  
 4 of the relevant period, he was being treated for it. In the context  
 5 of this case, where Plaintiff allegedly suffered from a mental/  
 6 emotional impairment, the Court is hard pressed to agree with the ALJ  
 7 that Plaintiff's failure to follow his doctor's advice and seek  
 8 specialized care for his condition is sufficient cause to discredit  
 9 his entire testimony. *Regennitter v. Comm'r of Social Sec. Admin.*,  
 10 166 F.3d 1294, 1299-1300 (9th Cir. 1999) ("'[I]t is a questionable  
 11 practice to chastise one with a mental impairment for the exercise of  
 12 poor judgment in seeking rehabilitation.'") (quoting *Nguyen v. Chater*,  
 13 100 F.3d 1462, 1465 (9th Cir. 1996)). As such, this issue, too, is  
 14 remanded for further consideration.<sup>2</sup>

15                          IV. CONCLUSION

16       For the reasons set forth above, the ALJ's decision is reversed  
 17 and the case is remanded to the Agency for further consideration.

18       IT IS SO ORDERED.

19       DATED: September 26, 2013.

20                            
 21

22                          PATRICK J. WALSH  
 23                          UNITED STATES MAGISTRATE JUDGE

24                          S:\PJW\Cases-Social Security\BERKEY, 1762\Memo Opinion and Order.wpd

25       <sup>2</sup> The parties informed the Court in the Joint Stipulation that  
 26 Plaintiff died in January 2013 and have both discussed and relied on  
 27 Plaintiff's death certificate, which was purportedly attached to the  
 28 Joint Stipulation. The death certificate was not attached to the  
 Joint Stipulation and the Court has not considered it in reaching its  
 decision.